



September 12, 2001

Mr. William E. Wood
Assistant City Attorney
Development & Financial Services
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2001-4075

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151241.

The City of San Antonio (the "city") received a request for copies of all proposals submitted to the city referencing the city's Request For Proposal # 01-012. Although the city does not raise any exceptions to disclosure, you advise this office that the requested information may involve the proprietary interests of Ascom Transport Systems, Inc. ("ATSI"), CTR Systems, Inc. ("CTR"), Scheidt & Bachmann U.S.A., Inc. ("S&B"), and Accutronics, Inc. ("AI"). Thus, the city is asking this office for a decision under section 552.305(a) of the Government Code. You have submitted to this office copies of letters the city sent to ATSI, CTR, S&B, and AI, notifying those companies of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions to the Public Information Act in certain circumstances). You also have submitted copies of the information at issue. ATSI and CTR have submitted to this office briefs asserting that the requested information is excepted from disclosure under section 552.110 of the Government Code.¹ We have considered ATSI's and CTR's arguments and reviewed the submitted information; however, this office has received no briefing from S&B or AI as

¹ATSI also claims that portions of its bid information which constitutes "commercial or financial information for which it is demonstrated that disclosure would cause substantial competitive harm" is excepted from disclosure under section 552.113 of the Government Code. Section 552.113 excepts from disclosure certain geophysical information in conjunction with subchapter M, chapter 91 of the Natural Resources Code, or other information as defined in that section, relating to certain aspects of the oil and natural gas industry. *See* Gov't Code § 552.113(a)-(k). However, since ATSI has raised section 552.110, and language similar to that used in ATSI's claim also appears in section 552.110(b), we assume that ATSI is referring to that section.

of the date of this decision. As of the date of this decision, neither S&B nor AI have submitted to this office any reasons explaining why the requested information should not be released. Therefore, we have no basis to conclude that their information is excepted from disclosure, and it must be released to the requestor.

We must first address certain procedural matters. Among other requirements, the city was required to submit to this office copies of the specific information requested, or representative samples if the information is voluminous, not later than the fifteenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(e)(1)(D). The city received the request for information on June 8, 2001, and sent copies of the requested information to this office for review on July 2, 2001. In addition, one page of the information for which CTR claims exception from public disclosure is missing from the submitted copies.² Thus, the city failed to comply with this provision with respect to the missing page, and failed to comply timely with this provision as to the remaining information. As for the missing page, we have no basis on which to conclude that it is excepted from disclosure. Thus, to the extent that the city possesses this information, it must be released to the requestor. *See* Gov't Code §§ 552.301(e)(1)(D), .302. As for the remainder of the requested information, it is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." *Id.* § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has long held that a compelling reason sufficient to overcome the section 552.302 presumption of openness exists where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). Accordingly, we shall address below the claims raised by ATSI and CTR for the remainder of the requested information.

Both ATSI and CTR assert that portions of their respective bid proposal information are excepted from public disclosure under section 552.110(a) and (b). Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

As to section 552.110(a), a "trade secret":

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be

²We refer to page two of tab 9 of the CTR bid proposal, which, according to CTR, contains information related to the city's litigation disclosure form.

a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Both ATSI and CTR argue that their respective bid proposals contain information that constitutes trade secrets. Both companies address aspects of the six trade secret factors, and assert specific reasons why certain portions of the information concerning system design, configuration, and methodology should be excepted from disclosure. Thus, both ATSI and CTR make a *prima facie* case through specific arguments and representations that specific portions of their information constitute trade secrets, and this office has received no comments to the contrary. However, though ATSI and CTR argue that their respective system component pricing should also be excepted, we do not believe that the portions containing pricing information are excepted from disclosure under section 552.110(a). See Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); see also Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company), 319 (1982) (stating that pricing proposals are entitled to protection only during bid submission process), 184 (1978). Accordingly, we have marked those portions of the ATSI and CTR information that the city must withhold under section 552.110(a).

Section 552.110(b) requires the entity arguing the exception to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Although both ATSI and CTR claim exception for portions of their information, including pricing information, under section 552.110(b), only CTR demonstrates by specific factual and evidentiary arguments that substantial competitive injury would result from disclosure of portions of its bid proposal information. In addition, as noted above, we do not believe that pricing information is excepted from disclosure under section 552.110. Accordingly, we have marked those portions of the CTR proposal information that the city must withhold from public disclosure under section 552.110(b).

In addition, we note that some of the information submitted to this office for review appears to be copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

In summary, the city must withhold the information we have marked in both the ATSI and CTR bid proposals under section 552.110(a) of the Government Code, and in the CTR bid proposal under section 552.110(b). The remaining information must be released

to the requestor. To the extent this remaining information is copyrighted, it must be made available to the requestors, but the city must comply with the copyright law and is not required to furnish copies of information that is copyrighted.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

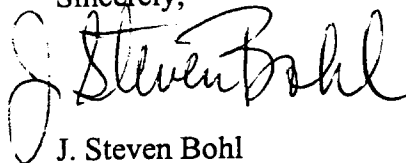
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 151241

Enc: Submitted documents

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